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No. 75-1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF RADIOTELEPHONE SYSTEMS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET. AL.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT, THE NATIONAL ASSOCIATION OF BUSINESS AND EDUCATIONAL RADIO, INC., IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) has not yet been officially reported. The orders of respondent Federal Communications Commission are: (1) the Second Report and Order in Docket 18262 (Pet. App. 34a-134a) reported at 46 F.C.C.2d 752 (1974); (2) a Memorandum Opinion and Order on reconsideration in Docket 18262 (Pet. App. 135a-266a) reported at 51 F.C.C.2d 945 (1975); and (3) a Memor-

andum Opinion and Order denying further reconsideration in Docket 18262 (Pet. App. 267a-273a) reported at 55 F.C.C.2d 771 (1975).

JURISDICTION

The judgment of the court of appeals (Tamm, MacKinnon and Wilkey, Opinion by Wilkey, Cir. J.) was entered on January 5, 1976. The petition for a writ of certiorari was filed on February 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Certain sections of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, are set out in Pet. App. 274a-292a.

QUESTION PRESENTED

1. Whether the FCC's orders in Docket No. 18262, allocating new frequencies for various land mobile radio services and establishing a regulatory framework governing their use, are within the broad authority granted it with regard to radio licensing and regulation under the Communications Act of 1934.

STATEMENT

The National Association of Radiotelephone Systems (NARS) seeks review of a decision of the court of appeals, affirming orders of the Federal Communications Commission which allocated portions of the frequency spectrum between 806-947 MHz for a variety of land mobile radio services. The FCC's orders are the result of rulemaking proceedings which were instituted more than seven years ago to establish

a comprehensive, long range plan to meet burgeoning and previously unserved needs for mobile radio service into the 1980's.

Respondent, National Association of Business and Educational Radio, Inc. (NABER), is a non-profit corporation composed of more than 12,000 licensees in the Business Radio Service, the largest and fastest growing private land mobile radio service. Since its founding in 1965, NABER has represented the interests of Business Radio Service licensees in various matters, primarily before the FCC. NABER participated fully in the Docket 18262 rulemaking proceedings and intervened in support of the FCC in the court of appeals.

The land mobile radio services were formally established in a 1949 proceeding which set aside "block" allocations for private users according to industry type (for example: taxicab, petroleum, and power) and allocated frequencies for radio common carriers. *General Mobile Radio Services,* 13 FCC 1190 (1949). The land mobile service grew much faster than originally expected, and, by 1968, the FCC recognized that the enormous demands for new and innovative land mobile service and for relief of critically congested land mobile channels could not be met under the 1949 allocations.[1] That year the FCC instituted an inquiry and rulemaking in two dockets to determine how these long range needs might be met. Docket 18262 was concerned with allocation of a portion of the

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[1] Frequency allocations to these services were essentially unchanged until 1970, during which time the land mobile radio service grew from 12,000 licensees authorized to operate about 150,000 radio transmitters to 290,000 licensees authorized to operate more than 3,000,000 transmitters, a phenomenal 25 fold increase both in licensees and in licensed transmitters (Pet. App. 169a).

900 MHz band for new and innovative land mobile services while a companion proceeding dealt with the use of certain UHF television frequencies to partially relieve congestion of land mobile channels in a few larger cities. Extensive written comments and research studies were received in 1968 and 1969 and the FCC heard two days of oral argument, *en banc,* in both dockets in January, 1970. *First Report and Order, Docket No. 18261,* 23 FCC 2d 325 (1970).

When the FCC granted interim relief in Docket No. 18261, it adopted its *First Report and Order and Second Notice of Inquiry*[2] in the proceeding here under review, allocating 115 MHz of spectrum space in the 900 MHz band for future use both for common carrier land mobile communications systems and for private land mobile systems and inviting further studies and comments on the implementation of this large portion of the spectrum. In response to this second opportunity for interested parties to participate in this rulemaking, the FCC again received detailed comments and studies over a more than two year period and heard two days of oral presentations, *en banc,* in May, 1973. The FCC also received and considered the views of the Justice Department and the Office of Telecommunications Policy and permitted further comments thereon by interested parties prior to adopting its *Second Report and Order* in May, 1974 (Pet. App. 34a-134a), nearly six years after the commencement of the proceeding.

In its *Second Report and Order* (Pet. App. 34a-134a) and its *Memorandum Opinion and Order* on reconsideration (Pet. App. 135a-266a), the FCC established allocations for several types of land mobile radio systems. The FCC set aside 40 MHz for an innovative "cellular" mobile telephone system initially proposed by AT&T. In allocating 40 MHz for this new service, the FCC originally limited eligibility to wireline carriers on the assumption that they were the only entities capable of developing this new system (Pet. App. 47a). When a radio common carrier later stated that it was willing and able to develop a "cellular" system, the FCC made it clear that *any* carrier was eligible to compete for authority to establish a "cellular" system (Pet. App. 150a).

[2] 35 Fed. Reg. 8644 (1970).

The FCC also set aside 30 MHz for "trunked" and conventional radio dispatch systems operating in the Public Safety, Industrial and Land Transportation Radio services. These frequencies were made available to three types of entities: private users eligible for licensing in the Public Safety, Industrial and Land Transportation Radio Services utilizing an entire mobile dispatch system; groups of similarly eligible users with smaller communications requirements sharing a portion of a single system; and entrepreneurial "Specialized Mobile Radio Systems" (SMRS) providing mobile dispatch service to eligibles for profit. All are to be licensed on a first come-first served basis rather than according to the "block" allocation plan used previously at other frequencies (Pet. App. 39a). Detailed requirements were established to promote system efficiency and to maximize the availability of service to users. See e.g., 47 C.F.R. § 89.601, *et seq.*

The FCC determined that the new SMRS entities would operate competitively and should not be regulated as either interstate or intrastate radio common carriers under the Communications Act (Pet. App.

155a-163a). The FCC emphasized, however, that existing radio common carriers (RCCs) would be eligible both to obtain SMRS authorizations and to continue providing regulated carrier services on frequencies previously allocated to them (Pet. App. 185a). Indeed, the FCC expects that RCCs will play a "major role" in the development of SMRS systems (Pet. App. 185a). Because the equipment necessary to operate spectrally efficient trunked systems is quite expensive and involves the application of untried technology, the FCC permitted each radio equipment manufacturer one system to stimulate the rapid development of these high capacity systems (Pet. App. 139a). To insure that state regulatory activities did not arbitrarily limit the number of SMRS which would be allowed to provide service, the FCC asserted its exclusive licensing authority and preempted state jurisdiction over entry into the SMRS field (Pet. App. 188a-189a).

Although the FCC's orders in no way diminished the spectrum available to NARS' members, altered their status as regulated common carriers or restricted their ability to provide service on the newly allocated frequencies, NARS requested that the new allocation be stayed in its entirety and subsequently filed a wide-ranging appeal, challenging the FCC's regulatory scheme both for "cellular" systems and SMRS. NARS did not challenge the FCC's allocations for private or shared mobile radio systems. The court of appeals disagreed with NARS' contentions that allowing AT&T to operate cellular systems and allowing each equipment manufacturer a limited opportunity to operate one SMRS raised a question of potential anticompetitive impact substantial enough to warrant reversal or modification of the FCC's orders (Pet. App. 15a-30a).

Although NARS argued that the new SMRS must be regulated as common carriers, the court of appeals affirmed the FCC's actions and held that if the systems operate in the expected manner, they would not be common carriers as a matter of law (Pet. App. 27a). The court also affirmed the FCC's assertion of exclusive control over radio licensing as fully consistent with the terms of the Communications Act and the controlling principles governing preemption as stated by this Court (Pet. App. 31a-32a).

Thereafter NARS filed a petition for a writ of certiorari with this Court. It was not joined here by other petitioners below including the National Association of Regulatory Utility Commissioners, the organization representing the state public utility commissions.

None of the contentions presented by NARS merits the attention of this Court. All were thoroughly considered by the FCC in exhaustive rulemaking proceedings spanning more than seven years and the FCC's disposition of these matters was unanimously affirmed by the court of appeals. NARS has presented no novel or important questions of law which warrant the attention of this Court. For these reasons, NABER respectfully submits that the petition for a writ of certiorari is lacking in merit and should be denied.

ARGUMENT

The Federal Communications Commission's orders in this proceeding, unanimously affirmed by the court of appeals, are within the broad discretion granted it with regard to radio licensing and regulation under the Communications Act of 1934 and present no issues which warrant consideration by this Court.

1. The FCC's Regulatory Plan for the Development of Cellular Systems and Its Decision to Allow Manufacturers One System Were Properly Affirmed by the Court of Appeals and Are Fully Consistent with This Court's Decision in Gulf States Utilities Co. v. FPC.

The FCC's orders allocated frequencies in part for the development of a nationwide "cellular" mobile radio communications system utilizing new and sophisticated technologies. In so doing, the FCC considered the antitrust implications of its actions, in accord with *Gulf States Utilities Co. v. FPC,* 411 U.S. 747 (1973), and adopted measures designed to minimize any potential anticompetitive effects (Pet. App. 47a-49a). The Department of Justice fully participated in this proceeding before the FCC and supported the FCC's actions in the court of appeals. The court of appeals found that the claimed anticompetitive effects were at best "contingent upon a variety of factors" (Pet. App. 15a), and that they would be subject to both the FCC's and the Department of Justice's ability to supervise and assess the development of this field (Pet. App. 15a-16a). Review by this Court is, therefore, unwarranted.

The FCC's decision to allow manufacturers to operate one 900 MHz system also presents no issue requiring review by this Court. The FCC restricted manufacturer involvement in providing mobile radio services to one SMRS system. 47 C.F.R. § 89.657. Some manufacturer participation was deemed necessary to ensure the rapid development of sophisticated mobile dispatch equipment. The court of appeals rejected the contention that the FCC had failed ". . . to give adequate consideration to possible anticompetitive effects . . ." and found that ". . . on the present record, no such

anticompetitive effects have been shown . . ." (Pet. App. 30a-31a). The court of appeals also noted that the FCC may adopt more restrictive licensing practices if a manufacturer's economic power discourages competition (Pet. App. 31a).

2. The Court of Appeals Properly Affirmed the Commission's Proposed Regulatory Treatment of SMRS and Its Preemption of State Entry Jurisdiction.

The FCC's regulatory treatment of SMRS rests on the determination that SMRS are not common carriers. This Court and many other federal and state courts have addressed the issue of what constitutes common carriage on numerous occasions, and the standards are well developed. In view of the types of communications services they will provide, the FCC concluded that SMRS should not be regulated as common carriers (Pet. App. 155-163a). The court of appeals examined the character of the services to be provided by SMRS and held that, to the extent that SMRS did not make a truly "public" offering, there was ". . . nothing in the record or the common carrier definition to cast doubts on [the FCC's] conclusions that SMRS are not common carriers." (Pet. App. 27a). The Court's decision on this issue involved the application of long-established principles of the law of common carriage to a particular fact situation. Since no novel question of law was presented or decided, this issue is not of sufficient importance to warrant review.

Petitioner's contention that the court of appeals' conclusion that SMRS are not common carriers is inconsistent with this Court's decisions in the *Chenery* cases[3] is without merit. In the second *Chenery* case,

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[3] *S.E.C.* v. *Chenery Corp.,* 318 U.S. 80 (1943); *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194 (1947).

this Court explained the *Chenery* principle as follows:

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment *which an administrative agency alone is authorized to make,* must judge the propriety of such action solely by the grounds invoked by the agency. *Id.* 332 U.S. at 196 (emphasis supplied).

The question whether an entity is a common carrier under specific regulatory statutes is not and never has been one which the ". . . . agency alone is authorized to make." It is a question of statutory interpretation, a function which courts may properly perform. See *Milk Transport v. ICC,* 190 F. Supp. 350 (1960), aff'd 368 U.S. 5 (1961); *Penn-Central Merger and N & W Inclusion Cases,* 389 U.S. 486 (1968); K. Davis, *Administrative Law Treatise,* § 16.12 (1970 Supplement). Under this principle, the court of appeals remained well within the limits of its authority as a reviewing court in upholding the FCC's determination.

The court of appeals also properly concluded that the FCC's assertion of its right to control the initial licensing and authorization of service for SMRS was consistent with the terms of the Communications Act. Title III of the Communications Act (47 U.S.C. § 301, *et seq.*) confers exclusive jurisdiction on the Federal Communications Commission to license radio facilities and, thereby, to establish comprehensive schemes of regulation not inconsistent with the terms of the statute. After extensive study of mobile dispatch services, the FCC concluded that allowing free entry into the SMRS field would best promote the "public interest"

in improved land mobile communications service (Pet. App. 177a-182a). After reviewing the FCC's orders, the court of appeals concluded that the federal scheme was based on an ". . . in-depth consideration of the effects of such a competitive approach. . ." as a means of maximizing the efficient development and use of these frequencies, and, therefore, was properly within ". . . the broad discretion granted [the FCC] with regard to radio under the 'public convenience, interest and necessity standard'. . ." of the Communications Act (Pet. App. 29a-30a). The court of appeals found preemption of state entry certification over SMRS ". . . reasonably necessary in order to create the atmosphere of free entry and competition. . ." (Pet. App. 31a).

The FCC's assertion of exclusive control over licensing of SMRS raises no substantial question of federal-state relations. The FCC, which has been entrusted by Congress with exclusive power in radio allocation and licensing matters, has properly asserted exclusive licensing authority over SMRS. The FCC's aliocation scheme could be readily frustrated if state regulatory authorities were to refuse to permit federally licensed entities from operating within a state (Pet. App. 188a). Since these two systems of regulation cannot exist side by side, the court of appeals correctly concluded that the FCC's action does not conflict with the decision of this Court in *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963).

The FCC's assertion of federal primacy does not violate § 152(b) of the Communications Act (47 U.S.C. § 152(b)) which restricts FCC jurisdiction over certain aspects of the operations of common carriers operating within one state. Since SMRS were determined

not to be common carriers, the court of appeals properly found that there could be no conflict with § 152(b) (Pet. App. 32a). Furthermore, the states' right to regulate intrastate carrier services is limited by the terms of § 152(b) to certain enumerated tariff matters such as "... charges, classifications, practices, services, facilities . . . [and] . . . regulations. . ." and is expressly made subject to the FCC's exclusive power to license all radio facilities under Title III of the Communications Act (47 U.S.C. § 301, *et. seq.*). Since the FCC's orders did not disturb the states' authority to regulate the matters enumerated in § 152(b) (Pet. App. 189a), petitioners claim that § 152(b) has been violated is completely without foundation, even if SMRS are classified as common carriers. The lack of any substantial question of federal-state relations is underscored by the fact that the National Association of Regulatory Utility Commissioners, representing the parties most directly interested in such questions, did not join in the petition for a writ of certiorari even though it was a petitioner below.[4]

Petitioner's contention that the FCC's scheme of regulation of SMRS conflicts with this Court's decision in *FPC v. Texaco, Inc.*, is similarly without merit. *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974). In *Texaco*, the FPC decided not to regulate small natural gas producers in the face of a clear statutory mandate that

[4] NARUC's publicly stated reasons for not seeking a writ of certiorari, as quoted in a trade publication, were as follows:

> "Inasmuch as the Court preempts State jurisdiction only of SMRS operating as noncommon carriers, and the classification of SMRS remains open to challenge if they operate as common carriers, the decision does not appear to threaten State regulation of intrastate common carriage" *Industrial Communications*, January 30, 1976 at 5

required such regulation. In this case, the FCC has acted in a manner fully consistent with the terms of its governing statute. Since SMRS are not common carriers, no section of the Act relating to the regulation of common carriers is applicable. There are no statutory provisions which mandate any particular regulatory treatment of SMRS, and the scheme finally adopted by the FCC was found by the court of appeals to be fully within the scope of its broad discretion to regulate all radio services. If some SMRS should in practice operate as common carriers, the court of appeals has instructed the FCC then to "determine its responsibilities from the language of the Title II common carrier provisions" (Pet. App. 27a). Therefore, there can be no question that, under the terms of the court's affirmance, the FCC's scheme of regulation will not be inconsistent with any statutory mandate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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